

In the Matter of:)
)
 Broadcast Localism) MB Docket No. 04-233
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The Arizona Broadcasters Association, the Kentucky Broadcasters Association and the Montana Broadcasters Associations (hereinafter "the Associations"), by their undersigned attorneys, hereby submit these comments in response to the Notice of Inquiry ("NOI") released July 1, 2004 in the above-captioned proceeding with respect to broadcast localism.¹

The Associations, whose members include hundreds of commercial and noncommercial radio and television stations in the States of Arizona, Kentucky and Montana, urge the Commission to find that no new policies, practices or rules are needed to promote localism.² As the record in this proceeding will demonstrate, communities across the country are currently well-served by their local broadcast stations through programming designed to meet the news, informational and entertainment needs of their communities, as well as through civic, charitable and community involvement.

² Additional information regarding the Associations is available at their respective websites, <http://www.azbroadcasters.org/>, <http://www.kba.org/>, and <http://www.mtbroadcasters.org/>.

The Commission initiated this proceeding for three explicit purposes: first, to receive public input on how broadcasters are serving the interests and needs of their communities; second, to determine whether the Commission should adopt new policies, practices, or rules "designed directly to promote localism" in broadcast television and radio; and third, if such new policies, practices or rules are needed, to determine what they should be.³

All broadcasters have a substantial economic stake in identifying and responding to the interests and needs of their communities and do so. New rules will actually be counter-productive because they will stifle innovative and unique responses to community needs and they will result in unnecessary regulatory costs that will necessarily detract from broadcasters' abilities to promote localism tailored to their respective communities. New regulation intended to promote a narrow version of "localism" ignores these marketplace realities; it also ignores the definitional difficulties and serious constitutional issues this approach raises. Given the absence of demonstrated need for regulatory intervention, the Commission should retain confidence in the current deregulatory framework. It should continue to rely on competitive pressures and broadcasters' good faith efforts to achieve its public policy goals.

Discussion

The NOI initiates a wide-ranging inquiry into topics both directly and indirectly associated with broadcast localism. In addition to topics such as community communication and community-responsive programming, the NOI requests comment on the network affiliation rules, payola and sponsorship identification, voice-tracking, national playlists, license renewals, and low power FM service and additional spectrum allocations.⁴ The "myriad of policy, legal and

³ NOI at ¶ 7.

⁴ A number of the issues raised in the NOI have been, or will be, addressed in other proceedings. Examples include digital television public interest obligations ("[w]e will

technical questions"⁵ raised in this proceeding should not obscure Chairman Powell's recognition that "[o]ver the last several years, the Commission's review of the media marketplace has demonstrated that the broadcast community, at large, has made great strides in serving the needs of their local communities."⁶ The industry should be allowed to continue to take those strides, unfettered by new regulation.

The Associations' members, like broadcasters across the country, succeed because their listeners and viewers know that they are part of their communities. As the Commission has heard time and again during its task force hearings, broadcasters are deeply involved in their communities.⁷ As one witness explained, all broadcasters need an audience to stay in business and, to capture and maintain that audience, broadcasters must effectively respond to that audience's wants and needs.⁸ To that end, it is in each and every broadcaster's best interest to take steps that the member stations of the Associations routinely take, including the production and airing of local newscasts and local public affairs programs, the provision of reasonable access for political programming, the airing of public service announcements, and the promotion

incorporate relevant portions of the comments received in response to the *DTV Public Interest NOI* and associated *Notices* into the record of this proceeding," NOI at ¶ 8); disaster warnings ("we intend to launch a broad-ranging proceeding concerning [the Emergency Alert System] in the near future," NOI at ¶ 28); and network affiliation rules (discussing the June 2001 motion for declaratory ruling filed by the Network Affiliated Stations Alliance and noting Commission intent to "issue the requested declaratory ruling expeditiously," NOI at ¶ 32).

⁵ Motion of National Association of Broadcasters for Extension of Comment and Reply Comment Deadlines, MB Docket No. 04-233 at 1-2 (July 13, 2004).

⁶ NOI, Statement of Chairman Michael Powell.

⁷ The FCC's Localism Task Force scheduled six public hearings on the subject of localism to gather information from consumers, industry, civic organizations, and others on broadcasters' service to their local communities. Webcasts and written statements from those hearings are available at the Commission's Broadcast Localism website, <http://www.fcc.gov/localism/>.

⁸ See, e.g., Statement of Chuck Tweedle, Senior Regional Vice President, Bonneville International, FCC Broadcast Localism Hearing, Monterey, California (July 21, 2004), available at <http://www.fcc.gov/localism/hearing-monterey072104.html> (last visited October 29, 2004).

of charities and other public service activities: in short, serving their community's needs and interests.

The NOI asks whether "local programming" best serves the goal of ensuring that broadcasters are serving their communities' needs and interests, or whether the Commission should take a more expansive view and consider other efforts as well, such as participation in local community activities. This broader view is appropriate and should be embraced, particularly in light of the continuing rapid and dynamic changes in the industry.

The Commission should recognize broadcasters' community involvement as a key element of localism. Activities that involve community outreach - whether sponsoring a health fair or holding a fundraiser for a volunteer fire department - offer an unparalleled opportunity for broadcasters to interact with their audience members and to obtain immediate feedback. Just as important, broadcaster participation ensures that community groups and non-profit organizations can spread their messages throughout the community and generate support for their volunteer and charity events. The continued sponsorship, support and participation of the Associations' members in events such as the annual Marine Corps' Toys for Tots drive are instrumental in creating the ties that help a community to flourish.

The specific type or level of community involvement that satisfies a broadcaster's public service obligation should not be mandated, however. Because regulations are by necessity applied uniformly, they cannot take into account local conditions, needs, and tastes. Consequently, new rules specifying types or levels of community involvement by broadcasters can only impede the goal of promoting community service.

Similarly, efforts to define what constitutes "local programming" also impede the goal of promoting community service. Indeed, it appears that the Commission itself recognizes that

attempts to define the term carry risks, such as the inadvertent exclusion of programming that serves the needs and interests of communities. Notably, in requesting comment on what might qualify as local programming, the Commission acknowledged that even "programming that is not specifically targeted to the local community may still serve the needs and interests of the community":

[W]hat would qualify as 'local' programming? Locally originated or locally produced programming? Or should locally oriented programming . . . count regardless of its source? . . . Should programming qualify only if it treats local issues in the traditional sense of news and public affairs, or should local programs of an entertainment nature - such as the broadcast of a local high school sports event - also count? What about programming in which local residents participate? Difficulties associated with defining "local" programming present geographic questions as well. We also note that programming that is not specifically targeted to the local community may still serve the needs and interests of the community.⁹

As the NOI concedes, programming that is responsive to community needs and interests cannot be readily categorized. Communities are unique, as are the ways in which broadcasters determine and respond to the needs and interests of their communities. Instead of circumscribing community-responsive programming, the Commission should adopt a "hands off" approach and encourage the diversity and creativity that results when each broadcaster determines, on its own, how best to serve its community. As initiatives such as the "Amber Alert" program demonstrate, the Commission can rely on broadcasters to be attentive to their communities' needs and interests and to voluntarily develop and air programming responsive to those needs and interests.

To the extent the Commission attempts to determine what types of programming do or do not serve a community, it approaches prohibited content regulation. Indeed, the Commission appreciates the First Amendment concerns raised by the NOI and describes itself as sensitive to

⁹ NOI at ¶ 14 (footnotes omitted).

them.¹⁰ The Commission must maintain this constitutional sensitivity and decline to impose specific programming standards in response to groups claiming that broadcasters "do not air enough community-responsive programming."¹¹ Stations cannot be all things to all people. As the Commission observed over two decades ago, "[i]n every community there are many possible issues worthy of discussion. It is appropriate for an individual licensee to take into account the coverage of issues by other stations, as well as the preferences of its particular audience, in determining which issues it should be addressing."¹²

In the 1980s, the Commission chose to eliminate programming guidelines and look to marketplace forces to ensure community-responsive programming. In explaining its decision to deregulate radio, the Commission observed that the nation "has always relied to the maximum extent" on the good faith efforts and discretion of licensees in carrying out their obligations:

... Congress established a mandate for the Commission to act in the public interest. We conceive of that interest to require us to regulate where necessary, to deregulate where warranted, and above all, to assure the maximum service to the public at the lowest cost and with the least amount of regulation and paperwork. The system of broadcasting that was established in this nation has always relied to the maximum extent on the good faith efforts and discretion of licensees in carrying out their obligations. In taking the actions outlined above we have relieved radio broadcasters of substantial burdens but have also given them added responsibility--the responsibility to determine how best to serve their public without the Commission providing detailed requirements on how to go about doing so. We are confident that they are up to the task before them.¹³

In the two decades since this deregulation, broadcast stations have introduced new and innovative ways to communicate with their communities, have produced and aired programming

¹⁰ NOI at ¶ 12.

¹¹ NOI at ¶ 13.

¹² *Deregulation of Radio*, 84 FCC 2d 968 n.32 (1981).

¹³ *Id.* at ¶ 10.

designed to meet the news, informational and entertainment needs of those communities, and have sponsored and participated in a wide range of civic, charitable and community events. Their on-going efforts prove that marketplace solutions are consistent with public interest concerns.

A system of broadcasting that relies on the good faith efforts and discretion of licensees in carrying out their obligations is inconsistent with the type of behavioral regulation that the Commission now appears to be contemplating. Such regulation, if expansively applied to all broadcasters for the purposes of promoting localism, is unlikely to survive judicial scrutiny.

Where, as may be the case here, an agency proposes to depart from its "former views," it must provide "a reasoned analysis for the change beyond that which may be required when [it] does not act in the first instance."¹⁴ An agency that fails to examine the relevant data and articulate a satisfactory explanation for its action, including describing a "rational connection between the facts found and the choice made," acts in an arbitrary and capricious manner, in violation of the Administrative Procedure Act.¹⁵ This "arbitrary and capricious" standard of judicial review is similarly violated when an agency fails to consider "an important aspect of the problem" when revising its position.¹⁶

In this instance, the driving force behind the NOI - the "problem" it seeks to address - is the concern that broadcast stations may be failing to meet the needs of their local communities. The Commission would be departing from its former views if it were to re-regulate in this area

¹⁴ *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 41-42 (1983) ("*State Farm*"), citing *Greater Boston Television Corp. v. FCC*, 143 U.S. App. D.C. 383 394, 444 F.2d 841, 852 (1970) (footnote omitted), *cert. denied*, 403 U.S. 923 (1971)

¹⁵ *State Farm*, 463 U.S. at 52, citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

¹⁶ *Id.* at 43.

for the purpose of achieving its localism policy goals. As such, it would be obligated to provide the reasoned analysis described in *State Farm*. At a minimum, the Commission would need to explain why additional regulation is necessary when communities across the country are currently well-served by their local broadcast stations, and why it believes its current procedures, such as the license renewal process, have proven inadequate to achieve its public policy goals. And, while the Commission need not address each of the options available to it, it must certainly explain the reasons for its conclusion that industry-wide regulations are more appropriate than individual actions targeting offending stations.

Fortunately, the NOI also recognizes that competitive market forces may be providing sufficient incentives for broadcast stations to satisfy public policy goals, and that additional regulation is therefore unnecessary. The Associations agree with this recognition. The vast majority of broadcast stations across the country strive to serve their communities. Like Chairman Powell, they believe that "serving the needs and wants of the local community not only fulfills a broadcaster's public obligations, it makes good business sense."¹⁷

Based on their own experiences and industry contacts, the Associations are confident that the record will demonstrate that broadcasters' good faith efforts, in conjunction with competitive forces, have been and remain sufficient to ensure that broadcasters timely identify community needs and interests and fulfill their responsibilities to their communities. The Commission's existing policies, practices and rules provide the supplemental force necessary to address isolated instances of irresponsibility.

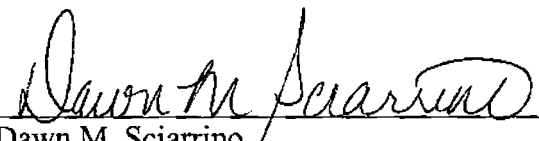
¹⁷ NOI, Statement of Chairman Michael Powell.

Conclusion

WHEREFORE, the Commission should retain confidence in the deregulatory framework that it has constructed and continue to rely on competitive pressures and market forces to achieve its public policy goals.

Respectfully submitted,

**ARIZONA BROADCASTERS ASSOCIATION
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